Supreme Court, U.S.
FILED

No. ___

04-366 SEP 13 2004

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners,

v.

BERNARD J. EBBERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the direct limitation on federal judicial power that Congress created over 70 years ago with Securities Act of 1933's specific nonremovability provision to guarantee certain securities plaintiffs their absolute choice of forum—which Congress recently amended to add just one exception—is nonetheless rendered meaningless by bankruptcy removal statute 28 U.S.C. §1452.

PARTIES

Plaintiffs-Petitioners are various public and private pension funds: California Public Employees' Retirement System; California State Teachers' Retirement System; Los Angeles County Employees Retirement System; State Universities Retirement System of Illinois; Board of Trustees of the Teachers Retirement System of the State of Illinois; Illinois State Board of Investment; West Virginia Investment Management Board; Washington State Investment Board; City of South San Francisco; Contra Costa County Employees' Retirement Board; Oakland Fire and Police Retirement System; Sacramento County Employees' Retirement System; Sacramento Regional Transit District Contract Employees' Retirement Plan; Sacramento Regional Transit District Salaried Employees' Retirement Plan; San Bernardino County Employees' Retirement Association; Sonoma County Employees' Retirement Association; Tulare County Employees' Retirement Association; Ventura County Employees' Retirement Association; and Milwaukee Employees' Retirement System.

Petitioners filed individual state-court suits alleging only Securities Act of 1933 claims against the following Defendants-Respondents: Bernard J. Ebbers; John W. Sidgmore; Scott D. Sullivan; Clifford Alexander, Jr.; James C. Allen; Judith Areen; Carl J. Aycock; Max E. Bobbitt; Francesco Galesi; Stiles A. Kellett, Jr.; Gordon S. Macklin; John A. Porter; Bert C. Roberts, Jr.; Lawrence C. Tucker; Juan Villalonga; CitiGroup, Inc.; Salomon Smith Barney Inc.; J.P. Morgan Securities Inc.; J.P. Morgan Chase & Co.; Bank of America Corp.; Banc of America Securities LLC; ABN AMRO Inc.; Deutsche Bank AG; Deutsche Banc Alex. Brown Inc.; Lehman Brothers Holdings Inc.; Lehman Brothers Inc.; Credit Suisse Group; Credit Suisse First Boston Corp.; Goldman Sachs Group, Inc.; Goldman Sachs & Co.; UBS Warburg LLC; NationsBanc Montgomery Securities LLC; and Arthur Andersen LLP.

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OPINIONS BELOW

The Second Circuit's May 11, 2004, opinion affirming the district court's decision is reported as *Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir. 2004), and reprinted in the Appendix at 1a-35a. The Second Circuit's denial of panel rehearing is reprinted at 93a-94a, and its denial of rehearing en banc is reprinted at 95a.

The district court's March 3, 2003, opinion is reported as *In re WorldCom Sec. Litig.*, 293 B.R. 308 (S.D.N.Y. 2003), and reprinted at 36a-79a. Its unpublished May 5, 2003, opinion adopting the March 3 opinion's reasoning is found online at *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2003 U.S. Dist. LEXIS 7406 (S.D.N.Y. May 6, 2003), and reprinted at 80a-86a. Its May 20, 2003, opinion declining to reconsider the May 5 opinion is reported at *In re*

WorldCom, Inc. Sec. Litig., 294 B.R. 553 (S.D.N.Y. 2003), and reprinted at 87a-92a.

BASIS FOR JURISDICTION IN THIS COURT

The Second Circuit Court of Appeals' order for which review is sought was entered May 11, 2004. 1a. That court denied panel rehearing on June 15, 2004, and denied en banc rehearing on July 23, 2004. 93a-94a; 95a. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

(1) Section 22(a) of the Securities Act of 1933: Jurisdiction of Offenses and Suits

> **Sec. 22.** (a) The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts except as provided in section 16 with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. . . . Except as provided in section 16(c), no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

(Codified as 15 U.S.C. §77v(a).)

(2) Section 16(c) of the Securities Act of 1933: Additional Remedies

* * *

> (c) *Removal of covered class actions.*—Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in

which the action is pending, and shall be subject to subsection (b).

(Codified as 15 U.S.C. §77p(c).)

(3) 28 U.S.C. §1334. Bankruptcy cases and proceedings

* * *

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(4) 28 U.S.C. §1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(5) 28 U.S.C. §1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

STATEMENT OF THE CASE

A. Introduction

Despite Securities Act of 1933 ("Securities Act" or "1933 Act") §22(a)'s plain command that "no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States," a two-judge panel of the Second Circuit ruled that securities defendants facing state-court individual actions may do just that. The panel concluded that the bankruptcy-removal provision enacted in the mid-1980s, 28 U.S.C. §1452(a), trumps a clear statutory prohibition against removal that has been in force for more than 70 years—explaining that despite §22(a)'s unambiguous command Congress never "intended to give individual plaintiffs an *absolute* choice of forum for claims brought under the 1933 Act." 29a (panel's emphasis); *accord* 3a.

The Second Circuit's ruling conflicts with this Court's precedent, which cites Securities Act §22(a) as an example showing: "When Congress has 'wished to give plaintiffs *an absolute choice of forum*, it has shown itself capable of doing so in unmistakable terms.'" *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (emphasis added, citation omitted). A grant of certiorari is proper under these circumstances. *See, e.g., United States v. Doe*, 465 U.S. 605, 610 (1984) ("We granted certiorari to resolve the apparent conflict between the Court of Appeals['] holding and the reasoning underlying this Court's holding in *Fisher*."); *accord Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

Certiorari is also called for because—as the panel itself candidly acknowledged—by ruling that §1452(a) trumps Securities Act §22(a), the Second Circuit has decided an issue of first impression under two important statutes that it says unambiguously conflict. *Am. Fed'n of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (granting certiorari because ques-

tion presented was "an important one of first impression under" the statute). The panel said it decided a "close question" presenting "a direct conflict between two unambiguous statutes." 2a. Because it settled that conflict by effectively nullifying §22(a)'s nonremovability feature—a crucial limitation on the exercise of federal jurisdiction—the panel's ruling warrants review. *See, e.g., United States v. Donovan*, 429 U.S. 413, 422 (1977) (certiorari granted to resolve "issues . . . concern[ing] the construction of a major federal statute"); *United States v. Ruzicka*, 329 U.S. 287, 288 (1946) (certiorari warranted for "questions of importance in the administration" of a statute).

Moreover, as the panel acknowledged, the issue affects numerous cases pending in the lower courts: "Because our resolution of this controlling question of law will determine whether scores of pending lawsuits are properly in federal court, we have considered this appeal on an interlocutory basis." 2a-3a. This, too, supports a grant of certiorari. *E.g., United States v. Powell*, 330 U.S. 238, 240 (1947) (certiorari granted because "of the importance of determining the controlling principle for settlement of the many claims of this character").

Finally, certiorari is called for because the panel's ultimate decision turned on what it admitted was a mere *assumption* that the district court had jurisdiction via the bankruptcy statutes. 13a. In so assuming, the panel failed to inquire into the threshold issue of subject-matter jurisdiction, in derogation of its responsibilities under this Court's (and the Second Circuit's) precedents. *E.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (on every appeal, jurisdiction is the first and fundamental question that must be satisfied); *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 47 (2d Cir. 2002) (appellate courts obligated "to conduct an independent inquiry into" jurisdiction).

By merely presuming that jurisdiction existed in the first place, and then nullifying §22(a)'s core nonremovability feature, the Second Circuit has issued a ruling that conflicts with this Court's precedents, and that abrogates Congress's intentions. Certiorari is proper.

B. Factual and Procedural Background, Including the Lower Courts' Purported Bases for Jurisdiction

While the factual and procedural histories of this action are recounted more fully in the opinions reprinted at 1a-35a and 36a-79a, the following provides a brief recital of this Petition's genesis.

Petitioners are state and private pension funds who lost in excess of $550 million by purchasing inflated WorldCom, Inc. ("WorldCom") corporate bonds. On June 25, 2002, WorldCom announced that it had improperly treated $3.8 billion in ordinary costs as capital expenditures, in violation of generally accepted accounting principles. 3a, 37a. It would have to restate its publicly reported financial results for 2001 and the first fiscal quarter of 2002. 37a. Thereafter, WorldCom made further disclosures suggesting that *all* of its financial results since at least 1999 must be restated. *Id.* Once the second-largest telecommunications company in the world, *id.*, WorldCom filed for bankruptcy on July 21, 2002. 4a n.4.[1]

WorldCom's announcements provoked myriad public and private responses. 37a. In addition to a Securities and Exchange Commission civil complaint and criminal charges brought by the United States Attorney for the Southern District of New York, defrauded WorldCom investors nationwide filed numerous securities-fraud class actions naming

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[1] WorldCom emerged from bankruptcy in April 2004. *See* Nina Montagu-Smith, *WorldCom Successor Rises From Ashes*, The Daily Telegraph (London), Apr. 21, 2004, at 33.

various defendants—including WorldCom, its former executive officers, directors and accountants, and underwriters of its bond offerings. 37a-38a. Although the bankruptcy filing automatically stayed litigation against WorldCom, the actions proceeded against the remaining defendants. 39a. At least 20 class actions filed in the Southern District of New York were consolidated in that district in August 2002, and in October 2002 the Judicial Panel on Multidistrict Litigation ordered the remaining class actions from around the country centralized in the Southern District pursuant to 28 U.S.C. §1407. 3a-4a.

Rather than join those class actions, Petitioners filed *individual* actions against Defendants-Respondents in state courts. 5a. Unlike the class litigants, Petitioners did not assert any claims under the Securities Exchange Act of 1934. Rather, they brought claims exclusively under the 1933 Act—whose §22(a) commands that, with one exception for certain class actions, "no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. §77v(a). The vitality of that anti-removal provision, which has been in force for over seven decades, was recently reaffirmed when Congress amended the securities laws via the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (1998), to add the single exception.

Despite §22(a)'s express command forbidding removal of non-class actions, defendants removed Petitioners' individual actions to federal court under 28 U.S.C. §1452(a), which permits removal of actions coming within the federal courts' bankruptcy jurisdiction as defined by 28 U.S.C. §1334(b)'s "related to" provision. The Underwriter and Director defendants asserted that the state-court actions were "related to" WorldCom's bankruptcy by virtue of ostensible contribution, indemnification, and contractual reimbursement rights they might someday assert against WorldCom. 5a-6a.

Upon removal, Petitioners' actions were consolidated for pre-trial purposes with the class actions pending before the Southern District of New York, the Honorable Denise Cote presiding. 6a.

The New York City Employees' Retirement System ("NYCERS"), which had brought an individual action in New York state court alleging violations of the Securities Act and New York law, filed the first relevant motion for remand. *Id.* The district court allowed Petitioners to intervene in NYCERS's proceedings for the purpose of arguing remand as well. *Id.*

Judge Cote denied NYCERS's remand motion on March 3, 2003. 7a. On May 5, 2003, after supplemental briefing by individual plaintiffs (including Petitioners), Judge Cote adopted the reasoning of her March 3 decision and denied Petitioners' renewed motion to remand. *Id.* On May 20, she declined to reconsider her remand decisions. *Id.*

Petitioners filed a motion to certify the May 5 and May 20 orders denying remand for interlocutory appeal to the Second Circuit. 8a. When, two months later, Judge Cote had yet to rule upon their §1292(b) motion, Petitioners on August 3 filed a mandamus petition in the Second Circuit. *Id.* Alerted to the petition, Judge Cote *sua sponte* withdrew Petitioners' pending motion for interlocutory appeal. *Id.*

The Second Circuit received briefing and argument, but ultimately denied Petitioners' mandamus petition on the grounds that §1292(b) presented a possible and adequate avenue for relief, and that the right to mandamus relief was not clear and indisputable. 9a. Petitioners renewed their §1292(b) motion before the district court. *Id.* The district court granted the motion to certify its May 5 and May 20 orders "insofar as they held that stand-alone 1933 Act claims can be removed" from state courts under 28 U.S.C. §1452(a), but "*declined* to certify the question of whether the individual

actions are 'related to' the WorldCom bankruptcy." *Id.* (panel's emphasis). The Second Circuit accepted the interlocutory appeal as delineated, giving it jurisdiction under 28 U.S.C. §1292(b). 9a, 11a-12a. Admittedly *assuming* that "related to" bankruptcy jurisdiction existed over Petitioners' actions, the Second Circuit confined its appellate inquiry to whether bankruptcy removal provision §1452(a) trumped the nonremovability command of Securities Act §22(a). 13a.

A two-judge panel concluded that it did. 35a.[2] Acknowledging the stark conflict created by the "equally unambiguous" terms of both §22(a) and §1452, 18a, the panel came down in favor of removal. Its rationales were various: §22(a) was not more "specific" than §1452(a), 23a-26a, and if §22(a)'s command were honored, it "could interfere with the operation of the Bankruptcy Code," 27a – although 70 years of practice showed otherwise. Although §22(a)'s nonremoval language was amended in 1998 (well after §1452(a)'s 1984 enactment) to provide a *single exception* to nonremovability, the panel was unconvinced that Congress had ever intended to provide an "*absolute* choice of forum" for their Securities Act claims. 3a, 29a (panel's emphasis).

REASONS FOR GRANTING THE WRIT

A. The Second Circuit's Holding Nullifies Over 70 Years of Clear Text in the Securities Act

In 1933, in response to the horrific securities scandals that in the late 1920s had laid waste to the American capital markets, Congress enacted the Securities Act—the first of the federal securities laws to protect investors. 15 U.S.C. §77 *et seq.* In so doing, Congress expressly authorized aggrieved investors to bring claims under the Securities Act in either state or federal court. *Id.* But the provision conferring

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[2] After oral argument, but before the decision was rendered, Judge Robert D. Sack recused himself for unspecified reasons. 2a n.1.

concurrent jurisdiction in state and federal courts strictly limited federal courts' removal jurisdiction:

> No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. §77v(a) (May 27, 1933, c. 38, Title I, §22, 48 Stat. 86). Damaged investors, including plaintiffs alleging Securities Act §§11 and 12 claims, were thus entitled to file their lawsuits in state court and to have that choice of forum honored.[3]

Sixty-five years later, Congress again addressed the removability of claims brought under the Securities Act. In 1998 Congress enacted SLUSA, which curtailed some securities *class-action* suits in state courts, while specifically preserving the 65-year-old prohibition against removal of *individual* state-court actions alleging only Securities Act claims—like Petitioners' actions here. Section 22(a) now reads:

> *Except as provided in section 16(c)*, no case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

15 U.S.C. §77v(a) (emphasis added).[4]

Despite this language specifying that a removal prohibition extant for nearly seven decades was now subject to a single, narrow exception, the Second Circuit ruled that individual actions falling outside that exception *can be removed* under 28 U.S.C. §1452.

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[3] This made sense, as at the time every state save Nevada had in place state-law securities regulations. 62a.

[4] Section 16 permits the removal of "class action[s] based upon the statutory or common law of any State." 15 U.S.C. §77p(b), (c). Because Petitioners' cases are individual, non-class actions, §16(c) is inapplicable.

The panel acknowledged that its holding conflicts not just with §22(a)'s text, but with the majority of courts to rule on the issue. "Many district courts to address the issue have reached the opposite conclusion." 20a. Still, the panel insisted that with Securities Act §22(a) Congress never "intended to give individual plaintiffs an *absolute* choice of forum for claims brought under the 1933 Act." 29a (panel's emphasis); *accord* 3a.

That conclusion conflicts on its face with this Court's precedent—which recently specified §22(a) as one of several statutes containing "indisputable prohibitions of removal." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003). And, in stark contrast to the Second Circuit's insistence that Congress never meant for Securities Act plaintiffs to retain their "*absolute* choice of forum," this Court explained that §22(a)'s text illustrated that "[w]hen Congress has 'wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms.'" *Id.* (citation omitted).

Because the Second Circuit has decided a federal question in a way that conflicts with this Court's decisions, certiorari is warranted. *See* S. Ct. Rule 10(c); *see also Doe*, 465 U.S. at 610 ("We granted certiorari to resolve the apparent conflict between the Court of Appeals[']] holding and the reasoning underlying this Court's holding in *Fisher*."); *Lugar*, 457 U.S. at 926 (because decision "appears to be inconsistent with prior decisions of this Court, we granted certiorari"). Moreover, the panel's decision presents an issue of grave "importance . . . for the [investment] community and for the administration of the [securities] laws." *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978); *see also Donovan*, 429 U.S. at 422 (certiorari granted "to resolve these issues, which concern the construction of a major federal statute"); *Ruzicka*, 329 U.S. at 288 (certiorari warranted for "questions of importance in the administration" of a statute).

The panel's decision is truly amazing. For the first time in §22(a)'s seven-decades-long existence, its express removability prohibition has been rendered powerless. Because the panel's ruling authorizes an exercise of federal judicial power that Congress explicitly chose to forbid—first in 1933, and again in 1998 with its careful amendments to the securities laws—the need for review by this Court could not be more pressing.

B. A Writ of Certiorari Is Further Warranted Because the Panel's Decision to Overlook a Threshold Jurisdictional Question Ignores Binding Precedent

The Second Circuit's failure to ask and answer the threshold question of whether jurisdiction even existed presents a second reason justifying the issuance of a writ of certiorari. "'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" *Steel Co.*, 523 U.S. at 94 (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

Rather than fulfill its obligation to determine the threshold question of whether the requirements for federal bankruptcy jurisdiction existed, the panel jumped to the second question—of whether Securities Act §22(a) bars removal under bankruptcy statute §1452(a)—by simply *presuming* that subject-matter jurisdiction existed. "Because the issue is not properly before us," the panel wrote, "we intimate no view as to whether the Bondholders' claims are 'related to' WorldCom's bankruptcy case notwithstanding the tenuous connection between those claims and WorldCom's reorganization process." 13a. "Instead, *we assume* for the purposes of this appeal that the Bondholders' actions are 'related

to' the bankruptcy case, and we limit our inquiry to the one question properly before us: whether the District Court erred when it exercised bankruptcy jurisdiction over generally nonremovable claims brought under the Securities Act of 1933." *Id.* (emphasis added).[5]

But this Court holds that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) (Court's emphasis). Thus, although the appellate court "may not reach beyond the certified order to address other orders made in the case," it surely "may address any issue fairly included within the certified order because 'it is the *order* that is appealable, and not the controlling question identified by the district court.'" *Id.* (citation omitted, Court's emphasis). The threshold jurisdictional issue presented is one such issue "fairly included," and should have been addressed before the Second Circuit deigned to undo 70 years of clear statutory text.[6]

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[5] That assumption is likely erroneous, in any event. Defendants' ostensibly contingent claims would ripen only upon a finding of liability against the defendants – which would require a separate action to assert them. *See Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 295-96 (9th Cir. 1996). But the test for "related to" bankruptcy jurisdiction is whether the removed lawsuits themselves would affect the bankruptcy proceeding "*without* the intervention of yet another lawsuit." *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 381-82 (3d Cir. 2002) (emphasis added), *cert. denied*, 537 U.S. 1148 (2003). Similarly, defendants' purported indemnification for Securities Act violations is quite simply against public policy and therefore void as a matter of law. *See Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1287-89 (2d Cir. 1969) (indemnification of underwriters void); *In re Livent, Inc. Sec. Litig.*, 193 F. Supp. 2d 750, 754 (S.D.N.Y. 2002).

[6] A jurisdictional issue "is not only an issue that we can reach, *but one that we must reach*." *Larsen v. Senate of the Commonwealth*, 152 F.3d

"The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). This Court could not be clearer: "'"[E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it."'"[7] Until the panel decision below, the Second Circuit's precedents had long embraced this special obligation.[8]

The panel acknowledged it was deciding a "close question," 2a, but it had no need to reach the question if the jurisdictional prerequisites of §1334(b) "related to" bankruptcy were absent. The court's abdication of its responsibility to ensure that jurisdictional prerequisites were satisfied thus presents a second reason supporting the grant of a writ of certiorari. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 829 (2002) ("We granted certiorari to consider whether the Federal Circuit properly asserted jurisdiction over the appeal."); *Peacock v. Thomas*, 516 U.S. 349, 352 (1996) (certiorari granted to resolve circuit

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240, 245-46 (3d Cir. 1998) (citing *Steel Co.*, 523 U.S. at 93-95) (emphasis added).

[7] *Steel Co.*, 523 U.S. at 95 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (citations omitted)); *accord, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (appellate courts obligated to satisfy themselves not only of their own jurisdiction, but also that of the lower courts).

[8] *Marcella*, 293 F.3d at 46 (citing *Bender*, 475 U.S. at 541 (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934))); *see United States v. 27.09 Acres of Land*, 1 F.3d 107, 110 (2d Cir. 1993); *W. Hartford v. Operation Rescue*, 915 F.2d 92, 99 (2d Cir. 1990).

conflict and "to determine whether the District Court had subject-matter jurisdiction").

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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